Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

JONATHAN SHERMAN WHITSON,

Petitioner,

v.

THE CITY OF GULF SHORES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether under the ADEA and ADA the petitioner presented evidence of pretext sufficient to defeat the respondent's motion for summary judgment, without the need to show that such evidence, by itself, was probative of discrimination.

II. Whether the petitioner presented sufficient evidence that he was qualified under the ADA and that the respondent failed to provide reasonable accommodations for his disability.

III. Whether the petitioner presented sufficient evidence of a causal link between his complaint with the EEOC and the decision to terminate him.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eleventh Circuit opinion and order affirming the district court is unpublished and is contained in Appendix A. The district court opinion is similarly unpublished and contained in Appendix B.

STATEMENT OF JURISDICTION

The Eleventh Circuit court of appeals entered judgment on June 9, 2003. App. A. The court of appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on August 12, 2003. App. C.

STATUTORY PROVISIONS INVOLVED

This case involves the Age Discrimination Employment Act ("ADEA"), 29 U.S.C. §§ 621-34, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(a), and retaliatory discharge in violation of those acts.

The ADEA states in pertinent part:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age.

29 U.S.C. § 623(a)(1).

The ADA states, in pertinent part, that an employer may not:

> discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

STATEMENT OF THE CASE

On September 4, 2001, petitioner Jonathon Sherman Whitson sued respondent City of Gulf Shores in the United States District Court for the Southern District of Alabama. Whitson asserted claims of discrimination under the ADEA and the ADA.

The City of Gulf Shores employed Whitson as a "Building Official" in July 1981. For eighteen years, he was responsible for zoning, inspection, code interpretations and code enforcement. Whitson also supervised other building inspectors and secretaries during his twenty-year employment tenure.

Whitson has Meniere's Disease that progressively causes severe hearing impairment in the form of distortion. During the last ten years of his employment, Whiston's steadily declining hearing eventually affected his performance, most notably in the area of communication; but he was nonetheless able to continue to perform as he had since 1981.

During the last year of his employment, Whitson asked the City for reasonable accommodations for his increasing hearing loss. At the City's request, an audiologist identified equipment that would assist Whitson in the performance of essential functions of his employment. Nonetheless, the City refused to provide Whitson with the equipment identified by the audiologist.

Despite his requests for accommodation, Whitson at age 55, was demoted in June of 2000. His supervisory authority and code interpretation functions were given to Josh Harris, a thirty-two years old male who was Whitson's subordinate. It was undisputed that Whitson had better qualifications and stronger supervisory ability than Harris.

Following Whitson's demotion and because of the continuing difficulties he was encountering with City with regard to his disability accommodation, Whitson filed an EEOC charge on October 19, 2000. On November 20, 2000, City received this charge. Subsequent to that receipt, the City Mayor then terminated Whitson, giving the written reason as "insubordination" identified by Harris identified in a memo he prepared after the City's receipt of the EEOC charge. The insubordination that Harris documented consisted of: (i) two incidents to which Whitson had responded he had not understood Harris; and (ii) Whitson's tape recording conversations in an attempt to foster his understanding. *Id.* The City terminated Whitson's employment in February of 2001.

Whitson's federal action alleged that these actions violated the ADEA and the ADA and the retaliatory protections provided by each of these acts.

At the conclusion of discovery, the City of Gulf Shores filed for summary judgment. In opposition, Whitson

presented direct evidence and sufficient evidence to support a prima facie case on each claim. Whitson further presented evidence that the respondent's proffered reasons for its acts were false or the veracity of which was at least suspicious enough that a jury should decide whether it was legitimate. Nonetheless, on August 30, 2002, the district court granted City of Gulf Shores' summary judgment motion stating that Whitson failed to produce sufficient evidence: (i) to show pretext under the ADEA or ADA; (ii) to show Whitson was otherwise qualified under the ADA and denied reasonable accommodations; and (iii) to show a causal link between his termination and the filing of the EEOC complaint. App B at 3a-4a.

Whitson filed a notice of appeal and motion to extend time to file said notice of appeal on October 2, 2002. On October 8, 2002, the district court granted Whitson's motion to extend time. On December 9, 2002, the Eleventh Circuit Court of Appeals determined that it had jurisdiction to consider the appeal and on June 9, 2003, the Court of Appeals affirmed the district court's judgment. App. A at 2a. The Court of Appeals denied the timely filed petition for rehearing and rehearing en banc on August 12, 2003. App. C. at 29a.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Court Of Appeals Conflicts With Decision Of The Supreme Court And With Prior Decisions Of The Eleventh Circuit.

The Court of Appeals' affirmation of the district court's entry of summary judgment cannot be squared with Supreme Court precedent regarding evidence sufficient to establish pretext.

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) confirmed the allocation of the burden of production and an order for the presentation of proof in discriminatory treatment cases set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny. First, the plaintiff must establish a prima facie case of discrimination, *St. Mary's* at 506, then the burden shifts to the defendant to produce evidence that employer took the adverse employment action for a legitimate, nondiscriminatory reason. Once these evidentiary requirements are met, the *McDonnell Douglas* framework — with its presumptions and burden — disappears and the remaining issue is "discrimination vel non." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983).

The *St. Mary's* decision clarified that

> although the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production, [*St. Mary's* at 511], the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn there from . . . on the issue of whether the defendant's explanation is pretextual,' [*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981)].

Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2106 (2000).

However, this Court further reasoned, it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief

> is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.

St. Mary's at 511.

Such an inference is "consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' *Wright v. West*, 505 U.S. 277, 296 (1992) [further citations omitted]." *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2108 (2000). Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

The decision below cannot be reconciled with *St. Mary's*. The district court found that the petitioner had provided sufficient evidence of a prima facie case. However, the district court found that the petitioner's evidence showing the falsity of respondents' proffered reasons for the adverse employment actions were not, by themselves, demonstrative of a discriminatory intent. App. B 18a and 19a. Under *St. Mary's*, however, the petitioner is entitled to have a trier of fact determine whether the falsity of the proffered reason, alone, is sufficient evidence to conclude that the respondent unlawfully discriminated.

The decision below also conflicts with previous opinions of the Eleventh Circuit. In *Carter v. Three Springs Residential Treatment*, 132 F.3d 635 (11th Cir. 1998), the court of appeals determined that to overcome the plaintiff's prima facie case,

a defendant must show the existence of a objective test binding on all who are similarly situated. Subjective standards are incapable of reasonable objective evaluation and cannot be relied upon by an employer seeking to defeat the plaintiff's prima facie case. *Id.* at 644. The United States Supreme Court mandates that the business's articulated reason be closely examined where it appears suspicious.

At the time each job performance evaluation was given, Whitson provided ample explanations that deflected all of the objective criticism directed at him. The trial court acknowledged the subjective nature of the respondent's non-discriminatory reason, but held nonetheless that Whitson failed to show sufficient evidence of pretext. In order to make this determination, however, the trial court had to make an impermissible credibility finding. That is, the trial court must have rejected Whitson's explanation for the objective portions of his poor performance reviews and instead gave credibility to the respondent's view of the facts. The trial court does just that when it holds "Whitson's claim that he can explain these 'misunderstandings' does not address the alleged pretext of the city's rational [sic]." App. B 19a. If the trial court had properly assumed that Whitson was correct, then Whitson's evidence that his job performance was not in fact objectively poor should have been sufficient to show pretext.

In an attempt to distinguish the impact of *Reeves* on the outcome of the inquiry, the trial court found, "Contrary to the facts in *Reeves*, plaintiff has failed to make even a minimal showing that respondent's articulated reasons for his termination were untrue." App. B 21a. This is simply wrong. Whitson made even more than a "minimal showing," he definitively refuted all objective reasons for his termination just as the plaintiff in *Reeves* did. Thus, Whitson is entitled to go to present his case to the jury because of the trial court's improper credibility determination and misapplication of the *Reeves* case.

Similar to the ADEA argument, the respondent offers Whitson's poor performance as a reason for his demotion and termination.[1] For the reasons set forth above, Whitson asserts that the trial court erred in its analysis of the falsity of the respondent's proffered explanation for the plaintiff's demotion.

Respondent states that the reason why Whitson was terminated by the city mayor Bodenhamer (the ultimate decision maker) was for "insubordination," providing a written explanation given by the mayor at the time of Whitson's termination. The insubordination for which Whitson was fired consisted of events relayed by Josh Harris. Whitson, just eight months before, had been Harris' supervisor and had recommended, in his supervisory capacity, against Harris receiving a promotion because he thought it would be "discriminatory." As soon as Harris is in a supervisory capacity to Whitson, he recommended that the City fire Whitson for "insubordination."

Most importantly, the "insubordination" for which Whitson was fired, consisted of: (i) two "direct refusal(s) to perform certain tasks;" (ii) excessive absenteeism; and (iii) tape recording conversation. Harris stated that Whitson's response to why he had not performed these tasks was that he "didn't understand what he was supposed to do." Although Bodenhamer found that Whitson's absenteeism was not grounds for termination, he found Whitson "ignored explicit directions from his supervisor regarding important assignments within his job duties" as set forth in Harris's memo. *Id.* These statements clearly contradict each other —

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1. Both of the courts below apparently confused the issue that plaintiff contends that the respondents actions in demoting him were the discriminatory acts at issue here, not the fact that he was later terminated. The act of his termination, plaintiff sets forth below, was in retaliation and/or in violation of the ADA.

even Harris did not state that Whitson had "ignored" explicit directions, rather Whitson had stated he hadn't understood.

The trial court again makes an impermissible credibility determination that flies in the face of Harris' own memo. The trial court finds that, "according to Harris, . . . [the plaintiff] should have and would have understood the assignment." App. B 9a. However, Harris's own memo relied upon by Bodenhamer in deciding to terminate the plaintiff only says that the plaintiff did not understand the assignment. Harris made his assertion that the plaintiff should have understood the assignment later in his affidavit he filed in this litigation.

The reasons given for Whitson's termination are directly related to and have everything to do with Whitson's disabilities. There is no dispute that Whitson had a worsening hearing problem that interfered greatly with his ability to communicate. He needed to tape record conversations to try to understand them later. He needed to have people speak slowly and to communicate clearly with him. Because he "did not understand" and tape-recorded conversations, Whitson was deemed "insubordinate" and terminated.

This evidence should easily be sufficient to show that the respondent's proffered reason for terminating Whitson is pretextual. At the least, Whitson's evidence should call into doubt the credulity of the respondent's proffered reason under clear United States Supreme Court precedent and Eleventh Circuit precedent.

The Eleventh Circuit also failed to follow its previous opinions regarding Whitson's claim that he was denied reasonable accommodations under the ADA. In *Lucas v. WW. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001), the court of appeals determined that an employer unlawfully

discriminates against a qualified individual with a disability when the employer fails to provide a "reasonable accommodation" for the disability — unless doing so would impose undue hardship on the employer.

The trial court below questioned whether Whitson had produced sufficient evidence for a jury to find that he was a "qualified individual" under the ADA. The trial court states that it was not Whitson's disability that rendered him unqualified to carry out his employment position, but rather his resistance to supervision and his poor judgment or negligence in performing his job. App. B at 24a.

The ADA defines a "qualified individual with a disability: as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The "essential functions of a job are those fundamental job duties of an employment position that the individual holds or desires." 29 C.F.R. § 1630.2.

Whitson provided ample evidence that he was qualified in that he could perform the essential functions of the employment position. Whitson was a twenty-year employee with the city as a Building Official and had been an active member and officer in many professional code oversight committees, such as serving as President and on the Board of Directors of the Code Officials of Alabama. Surely if Whitson had been unable to perform the fundamental job duties of "Building Official" he would not have enjoyed the respect of his professional peers in being elected as president.

Having established that he was qualified under the ADA definitions, Whitson provided evidence that the respondent failed to provide him with a number of reasonable

accommodations that would have allowed him to perform the essential functions of his work. Under the EEOC and CFR definitions of essential functions, evidence of whether to consider a particular function as essential can include the employer's judgment, whether written job descriptions were prepared and the amount of time spent performing the function. 29 C.F.R. § 1630.2 It is undisputed that proper communication was an essential function of plaintiff's position.

At the respondent's request and in response to his complaints, Whitson went to an audiologist to have testing done on his hearing in February 2000. In response to an inquiry by the City, the audiologist made a number of recommendations that the City could implement to accommodate Whitson's increasing hearing loss and foster the communication function: a digital BTE hearing aid, which would be used in conjunction with a wireless FM assistive listening system, and a TTY telephone.

The trial court found that the hearing aid would have been primarily for Whitson's personal benefit and would not qualify as a reasonable accommodation. However, the trail court overlooked the most important component of the audiologist's recommendation, which was the wireless receiver/transmitter. This device could be used only at work — much as a hearing impaired child may use one during school hours for the same reason — it cuts down on interference and background noise. While the hearing aid itself would have been something Whitson could have procured through insurance, the wireless receiver/transmitter clearly would have been work-related and should have been provided by the respondent. Instead, the respondent simply ignored the whole issue.

As to the TTY telephone, the respondent admits that it began to look into leasing or purchasing such a system for Whitson. However, after Whitson left on Family and Medical Leave in June of 2000 because of his disability, the respondent did not purchase the system.

The trial court below found that the accommodations would not have helped Whitson's "resistance to supervision, poor judgment or negligence in performing his job, or the fact that he was constantly absent from work." App. B. at 26a. Whitson provided ample evidence to the contrary — Whitson, as the respondent concedes, had trouble understanding his assignments. As the audiologist points out in his letter to the respondent, "Meniere's Disease causes poor speech intelligibility/understanding." If Whitson's requests for reasonable accommodation had been met, the problems perceived by his supervisors as insubordination or negligence would have been resolved.

Finally, the Eleventh Circuit failed to address the plaintiff's retaliatory discharge claim under its own precedent. The court of appeals has previously held that in order to show a prima facie case for retaliatory discharge, a plaintiff must show that he was: (i) engaged in a protected activity; (ii) that he suffered an adverse employment action; and (iii) that the protected activity was causally connected to the action. *Wright v. Southland Corp.*, 187 F.3d 1287, 1305 (11th Cir. 1999) (citing *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 919 (11th Cir. 1993). Respondent concedes that Whitson meets the burden of the first two elements of the claim. Thus, the only issue is whether the protected activity is causally connected to the action.

In this case, the recommendation to terminate Whitson was made by Harris, the individual who, eight months before, had been subordinate to Whitson. As stated above, Harris

made his recommendation for a number of reasons he outlined in a memo dated November 13, 2000. On November 20, 2000, the respondent received the EEOC charge. After receiving the charge, Bodenhamer requested that Harris be more specific in his reasons for wanting Whitson to be discharged. On December 4, 2000, Harris wrote a more in-depth memorandum. Bodenhamer made his decision to terminate Whitson based on "the conduct described in Mr. Harris's memo under heading C — 'Insubordination.'" As set forth above, that conduct consisted of two incidents about which Whitson had explained he did not understand — the same communication issues that have been addressed throughout this brief. One of the other items was excessive absenteeism, which Bodenhamer deemed as not serious enough for termination. The other item of insubordination was tape recording meetings — again, the same communication issue that plagued Whitson in his hearing-impaired world.

In any event, the memorandum that was the deciding factor in Bodenhamer's decision was clearly written **after** the city had knowledge that Whitson had filed an EEOC charge for the very reasons he was being terminated — the respondent's refusal to accommodate his hearing disability and discrimination because of his disability. The trail court attempts to explain away this causal link by relying on the case law that when the decision maker makes an independent investigation, the causal link is broken. However, here the decision maker admits that he relied on the post-charge recommendation of Harris, which in itself is replete with discriminatory animus. Thus, the causal connection is only strengthened and Whitson should be able to go forward on his retaliatory discharge claim.

II. The Questions Presented Are Important.

The opinion released by the court of appeals highlights the spotty application of clear Supreme Court precedent and adherence to its own precedent in Title VII discrimination cases. Despite that this Court has issued a clear mandate against discriminatory practices and has clarified the procedure by which a plaintiff may take his case to the jury, those substantive and procedural safeguards are undermined where, as here, the law of this Court is ignored.

In this case, the court below found that the petitioner presented sufficient evidence of a prima facie case. The respondent's articulated reasons for the adverse employment action, however, were clearly suspicious at best. The petitioner effectively presented sufficient evidence that would allow a trier in fact to disbelieve the respondent and find the proffered reasons false. The district court's requirement that the petitioner show further that the evidence is probative of discriminatory intent is in direct contradiction to this Court's decision in *St. Mary's*. It is disturbing that the clear mandates of this Court regarding the procedural requirements for surviving summary judgment on a Title VII case are being disregarded.

Moreover, the court of appeal's disregard for its own prior precedent and clear congressional intent is equally disturbing as to the issue of whether the petitioner was qualified under the ADA and whether he presented sufficient evidence of the respondent's failure to provide a reasonable accommodation.

The court of appeals further improperly disregarded petitioner's compelling evidence regarding the causal link in his retaliation case. The Eleventh Circuit's inconsistent application of the law to the facts is a compelling reason to grant certiorari in this case.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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